NO. 49054-4

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JERRY LEE SWAGERTY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 12-1-01877-6

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where the defendant's conviction and sentence were reversed by the Supreme Court, is the trial court's ruling on the defendant's post-trial DNA testing motion a final order entered after a final judgment that may be appealed under RAP 2.2(a)?

2. Where the post-conviction DNA testing issue is moot because the court can no longer provide relief, and where the issue is not one of continuing and substantial public interest, should this appeal be denied?

B. STATEMENT OF THE CASE.

The facts in this case are summarized in the Supreme Court's 2016 opinion and need not be repeated here. *See* ***In re: Personal Restraint of Swagerty***, 186 Wn.2d 801, 815, 383 P.3d 454, 460 (2016). Appellant Jerry Lee Swagerty (the "defendant") was convicted pursuant to a plea bargain (which spared him a life sentence as a persistent offender) of four non-most serious offenses in February 2013. CP 93-106, pp. 1-2. He did not file an appeal from his conviction, but instead filed a series of personal restraint petitions under case numbers 45826-4, 47639-8 and 48669-5. This Court granted a petition under case number 45826-4 and issued an unpublished opinion on January 21, 2015. *See* ***In re: Personal Restraint of Swagerty***, 2015 WL 264219 (January 21, 2015). This Court held that it, "must vacate Swagerty's convictions and remand for entry of an order

of dismissal." *Id.* p. 2. This would have exposed the defendant to re-prosecution as a persistent offender. Thereafter, the defendant petitioned the Supreme Court for discretionary review under case number 91268-8.

The Supreme Court granted discretionary review in December 2015. It issued an opinion partially reversing this Court's decision. ***In re: Personal Restraint of Swagerty***, 186 Wn.2d 801, 815, 383 P.3d 454, 460 (2016). It also issued a certificate of finality, thereby returning the defendant's case to the trial court for further proceedings. CP 134. At present the defendant's case is pending in the trial court; judgment has yet to be entered. CP 189-94.

The motion and trial court decision at issue in this appeal was filed before the Supreme Court decided the defendant's personal restraint petition. CP 119-121. However, as a result of the Supreme Court's decision, the defendant has since withdrawn his guilty plea and set this matter for trial. CP 189-94. At present, trial is set for May 22, 2017, and the parties are re-engaged in plea bargaining. *Id.*

C. ARGUMENT.

1. THE TRIAL COURT'S ORDER IS NOT A FINAL ORDER ENTERED AFTER A FINAL JUDGMENT, AND THUS, MAY NOT BE APPEALED UNDER RAP 2.2(A).

The state acknowledges that this Court's commissioner has ruled that the order may be appealed. RAP 2.2(a)(13) was cited. That provision states, "a party may appeal from only the following superior court

decisions: . . . (13) Final Order After Judgment. Any final order made after judgment that affects a substantial right."

In this case a judgment was entered against the defendant but it is not final. ***In re: Personal Restraint of Swagerty***, 186 Wn.2d 801, 815, 383 P.3d 454, 460 (2016). The reason it is not final is that the defendant filed a personal restraint petition which was considered and ruled upon by this Court on January 21, 2015. ***In re: Personal Restraint of Swagerty***, 2015 WL 264219 (January 21, 2015). This Court's opinion included the following: "Accordingly, we must vacate Swagerty's convictions and remand for entry of an order of dismissal. The State may then refile any charges for which the statute of limitations has not yet expired." *Id.* The defendant sought discretionary review in the Supreme Court which was granted. ***In re: Personal Restraint of Swagerty***, *supra* at 807. The trial court entered its order on May 12, 2016, after this court vacated the defendant's convictions.

The defendant's argument in the Supreme Court was that his case should be remanded for re-sentencing on one of the four counts only. *Id.* This would have been a massive change to the plea bargain. In October 2016, this Court's decision was reversed by the Supreme Court in part, when it held: "We reverse the Court of Appeals in part and remand this case to the trial court with direction to allow Swagerty the choice of withdrawing his personal restraint petition or accepting the vacated judgment and sentence for his convictions." *Id.* at 815. On November 28,

2016, the Supreme Court's Certificate of Finality carried out its holding by remanding the defendant's case to the trial court where the defendant's election is currently still pending. CP 148-88

A judgement reversed by an appellate court is not final. ***In re: Personal Restraint of Skylstad***, 160 Wn.2d 944, 954, 162 P.3d 413, 418 (2007). "When a court reverses a sentence it effectively vacates the judgment because the '[f]inal judgment in a criminal case means sentence'. . . Without the sentence there can be no judgment.' " *Id.* quoting ***Berman v. United States***, 302 U.S. 211, 212, 58 S. Ct. 164, 82 L. Ed. 204 (1937) (citation omitted). Thus where a conviction and sentence are reversed by an appellate court, no final judgment exists because the defendant has not been re-sentenced and in fact awaits the court's final judgment.

In addition to ***Skylstad***, further support for the view that the issue in this case is not appealable can be found in the DNA testing statute itself. The statute provides for post-conviction DNA testing, saying that such testing may be sought by a defendant "who currently is serving a term of imprisonment. . . ." RCW 10.73.170. A defendant whose conviction has been vacated, and who is therefore not incarcerated and not on community custody, is by definition not serving a term of imprisonment. *See* ***State v. Slattum***, 173 Wn. App. 640, 662, 295 P.3d 788, 799–800 (2013). Furthermore, one of the purposes of the statute is

"to provide a means for a convicted person to obtain DNA evidence that would support a petition for postconviction relief." ***State v. Riofta***, 166 Wn.2d 358, 368, 209 P.3d 467 (2009), citing ***United States v. Boose***, 498 F.Supp.2d 887, 889–90 (W.D.Miss.2007). Where a defendant has already obtained post-conviction relief, the justification for post-conviction forensic testing is eliminated.

In addition to not meeting the requirements of RAP 2.2(a), there is no showing that the defendant meets the requirements of the testing statute. RCW 10.73.170(2). The defendant must show that "(i) The court ruled that DNA testing did not meet acceptable scientific standards; or (ii) DNA testing technology was not sufficiently developed to test the DNA evidence in the case; or (iii) The DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information; (b) Explain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement; and (c) Comply with all other procedural requirements established by court rule." RCW 10.73.170(2). Whatever may be said of the DNA testing done before the defendant entered his guilty plea that was overturned, he has made no showing that the current DNA testing is lacking under any of these standards. Because there is nothing in the statute that requires duplication of testing done pre-

conviction, the trial court's order was appropriate and this appeal is not well taken.

Lest there be any argument that the above interpretation of RAP 2.2(a) would leave the defendant without a remedy, the current status of this case proves the opposite. CP 189-94. Further DNA testing, said to include a "full DNA packet" has been sought and is being provided to the defendant as pre-trial discovery. *Id.* The criminal rules, due process and pre-trial criminal procedure provisions permit a defendant whose case is pending before a trial court much broader access to forensic testing and without the limitations and restrictions of RCW 10.73.170. CrR 4.7(a)(1)(v). The short and long of it is that the criminal rules provide access to testing of evidence, such as DNA samples, that does not depend on the defendant meeting the requirements of RCW 10.73.170(2).

The post-conviction statutory requirements for DNA testing are onerous. RCW 10.73.170(2). By contrast the pre-trial discovery rules are not. The Supreme Court has described a defendant's access and investigation rights under CrR 4.7 in the broadest of terms:

> The Sixth Amendment right to effective assistance of counsel advances the Fifth Amendment's right to a fair trial. That right to effective assistance includes a "reasonable investigation" by defense counsel. *See* ***Strickland v. Washington***, 466 U.S. 668, 684, 691, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); ***In re Pers. Restraint of Brett***, 142 Wash.2d 868, 873, 16 P.3d 601 (2001). It also guarantees expert assistance if necessary to an adequate defense. ***State v. Punsalan***, 156 Wash.2d 875, 878, 133 P.3d 934 (2006). Supporting the right to effective

> representation, CrR 4.7(h)(4) provides that notwithstanding protective orders, the evidence must be disclosed "in time to permit ... beneficial use."

State v. Boyd, 160 Wn.2d 424, 434–35, 158 P.3d 54 (2007). ***State v. Grenning***, 169 Wn.2d 47, 58, 234 P.3d 169, 175 (2010) ("Boyd specifically held that '[t]he defendant does not have to establish that effective representation merits a copy of the very evidence supporting the crime charged.' ").

In this case the defendant filed his motion for post-conviction testing after this Court held that his conviction must be vacated. He also filed it after his petition for review had been accepted by the Supreme Court. Although the motion was filed before the Supreme Court issued its decision, it was filed after this Court had said, "we must vacate Swagerty's convictions and remand for entry of an order of dismissal." ***In re: Personal Restraint of Swagerty***, 2015 WL 264219 (January 21, 2015). Accordingly, the denial of the defendant's motion should not be considered appealable because it is neither a "final judgment" nor "a final order made after judgment". RAP 2.2(a)(1) and (13).

2. THE POST-CONVICTION DNA TESTING ISSUE IS MOOT WHERE THE COURT CAN NO LONGER PROVIDE RELIEF, AND WHERE THE ISSUE IS NOT A MATTER OF CONTINUING AND SUBSTANTIAL PUBLIC INTEREST.

In light of the unique procedural circumstances of this case, the requirements of the statute post-conviction DNA testing statute can no

longer be met. The post-conviction DNA testing issue is moot because the defendant no longer has post-conviction status. "A case is moot 'when it involves only abstract propositions or questions, the substantial questions in the trial court no longer exist, or a court can no longer provide effective relief.' " ***State v. Slattum***, 173 Wn. App. 640, 647, 295 P.3d 788, 792 (2013), quoting ***Spokane Research & Def. Fund v. City of Spokane***, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005).

The post-conviction circumstances that existed at the time the defendant filed his motion no longer exist. As such there can be no showing that (1) the defendant is "serving a term of imprisonment"; (2) the "DNA testing [ordered in the trial court] did not meet acceptable scientific standards"; and (3) "[t]he DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information". RCW 10.73.170(1) and (2). In short the issue is moot because this Court "can no longer provide effective relief." ***In re: Personal Restraint of Mines***, 146 Wn.2d 279, 283–84, 45 P.3d 535, 537 (2002), citing ***In re: Personal Restraint of Cross***, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983).

Although the DNA testing issue in this case is moot, under some circumstances this Court could nevertheless decide the issue. "A court may decide a technically moot case if it involves 'matters of continuing

and substantial public interest.' " ***In re: Personal Restraint of Mines***, 146 Wn.2d 279, 285, 45 P.3d 535, 537 (2002), quoting ***In re: Detention of Cross***, 99 Wn.2d 373, 377, 662 P.2d 828 (1983), quoting ***Sorenson v. City of Bellingham***, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)). In applying the continuing and substantial public interest standard, courts consider "(1) 'the public or private nature of the question presented,' (2) 'the desirability of an authoritative determination for the future guidance of public officers, and' (3) 'the likelihood of future recurrence of the question.' " ***In re: Personal Restraint of Mines***, 146 Wn.2d at 285, quoting ***Sorenson v. City of Bellingham***, 80 Wn.2d at 558, and ***People ex rel. Wallace v. Labrenz***, 411 Ill. 618, 622, 104 N.E.2d 769 (1952).

In the application of the above considerations it is readily evident that this case satisfies none of them. The issue here is purely private. It would have no impact on other post-conviction defendants who can already take advantage of the testing statute. Second, there is no need for an authoritative determination of the meaning of the statute. The statute is clear on its face, it just doesn't apply to this defendant at the present time. And finally, there is unlikely to be a future recurrence, where a judgment that was once final is no longer final by the time an appellate court reaches the issue. There is little or nothing in this case that supports this Court deciding a moot question.

Since the issue in this case is moot, and since a decision would not be justified under the continuing and substantial public interest standard, it follows that the trial court's denial of the defendant's motion should be affirmed. The trial court denied the motion but not with prejudice. Thus if the defendant goes to trial and is convicted, or if he reaches a plea bargain, this Court is likely to confront the DNA issue one way or another either in a future personal restraint petition or in a direct appeal.

D. CONCLUSION.

For the foregoing reasons the state respectfully requests that the trial court's denial of the defendant's motion be affirmed.

DATED: Monday, March 27, 2017

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3.27.17 Irene Vo
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